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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAVID ERIC JOHNSON, Plaintiff and Appellant, v. BETHANY BLAINE, Defendant and Respondent.	G041998 (Super. Ct. No. 05P000866) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Nancy A. Pollard, Judge. Motion to augment the record and motion to strike respondent's brief. Judgment affirmed. Motion to augment granted; motion to strike brief denied.

David Eric Johnson, in pro. per.; and Lawrence La Rocca for Plaintiff and Appellant.

David Eric Johnson, in pro. per., as Amicus Curiae on behalf of Plaintiff and Appellant.

Bethany Blaine, in pro. per., for Defendant and Respondent.

Plaintiff David Eric Johnson appeals from a judgment dismissing with prejudice his paternity action on the ground he was not the biological or presumed father, and awarding sole physical and legal custody of the child to his mother, defendant Bethany Blaine, denying plaintiff any visitation or contact. He claims: 1) judicial bias; 2) denial of an opportunity to present evidence; 3) the court erroneously changed custody at an ex parte hearing; and 4) defendant committed improprieties at a hearing or hearings. Finding no error we affirm.

INTRODUCTION

It is difficult to piece together what occurred; plaintiff fails to set out all the relevant facts as required, instead only providing us with a one-sided, abbreviated summary with very few record references. This violates California Rules of Court, rule 8.204(a)(1)(C) and (a)(2)(C). In addition, plaintiff's brief is a mixture of argument, "facts" without any support in the record, and unsubstantiated legal claims. There are some headings but the arguments under those headings are not confined to the point raised. This also violates court rules. (Cal. Rules of Court, rule 8.204(a).) Although we will address the issues raised in the headings, we will not consider all of the loose and disparate arguments included in the statement of the facts or discussion portions of the briefs that are not clearly set out in a heading and supported by reasoned legal argument. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) That we decline to return or strike the brief should not be interpreted as approval of violation of the appellate rules.

Defendant, too, did not comply with the rules as to format of briefs, failing to include tables of contents and authorities or headings (Cal. Rules of Court, rule 8.204(a)). Plaintiff moved to strike the respondent's brief on that basis and because we granted her an extension to file it. But in accepting defendant's brief we gave her no

more "special consideration" than we did to plaintiff. And because we are considering plaintiff's brief to the extent proper, we will consider defendant's as well, although it supplies little or no basis for our decision. The motion to strike the brief is denied.

At the time plaintiff filed the opening brief he also filed a bound document containing 15 exhibits, which we ordered treated as a motion to augment the record. We grant this motion with the proviso that we will consider only documents properly a part of an appendix. We may not and will not rely on documents outside of the trial court's record such as declarations and other documents not filed in the superior court. (*Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404; Cal. Rules of Court, rule 8.124(b)(3), (g).) That still leaves us an incomplete record. Although we have a clerk's transcript, it is incomplete, and the appendix, sans table of contents, contains only selective documents favoring plaintiff. This also violates the rules specifying what must be included and what is not allowed in an appendix. (Cal. Rules of Court, rules 8.122(b)(1), 8.124(b)(1)(B).)

Plaintiff's father, who shares his name, submitted a request to file an amicus brief, which we granted. The brief, however, also is in improper form and is more akin to a motion for us to take additional evidence in support of a reversal of the judgment. As plaintiff's father acknowledges, it contains documents that were not before the superior court and reflect events occurring a year after entry of the judgment. Those documents also, at minimum, lack foundation and are hearsay. "'"'"Although appellate courts are authorized to make findings of fact on appeal by Code of Civil Procedure section 909 and rule [8.252] of the California Rules of Court, the authority should be exercised sparingly. [Citation.] Absent exceptional circumstances, no such findings should be made. [Citation.]' [Citations.]" [Citation.]'" (*In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1388, italics omitted.) We will not consider the documents or any argument about their contents or effect. As to the remainder of the short brief it echoes the arguments made in plaintiff's briefs.

Moreover, plaintiff's father is not a party to this appeal nor does he have any relation to the child. Because plaintiff is not the biological or presumed father of the child, plaintiff's father is not the grandparent. This makes any claim that he may believe he has as to rights vis-à-vis the child all the more tenuous. Even biological grandparents have no constitutional right to visitation or even contact with a child. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1508.)

FACTS AND PROCEDURAL HISTORY

We recite the facts that can be found in the record. Defendant had a child in June 2005. It appears there was some belief plaintiff might be the father. In November 2005 plaintiff filed a request for a domestic violence protective order, apparently as part of or in conjunction with a paternity action. In connection with an order to show cause arising out of that action, in December 2005 the parties entered into a stipulation to share legal and physical custody; a visitation schedule was set out. Plaintiff agreed to take a paternity test. The parties also agreed to take parenting classes; upon proof defendant completed hers, the existing temporary restraining order would be "dissolved with prejudice." This order was signed by Judge Silbar.

At a hearing in June 2008, perhaps an order to show cause hearing although the record is unclear, where counsel for both parties were present, the court summarized some of the history of the case, including a series of orders, subsequent to the stipulation. Plaintiff did not include these orders in the appendix. In February 2008 defendant had also filed a separate domestic violence action and obtained a restraining order against plaintiff. As part of that order defendant was given custody; plaintiff had no right to visitation or any contact with the child. The court ordered a child custody investigation. That order was vacated at some point "only because" defendant did not appear at a

hearing. As a result, a prior order where the parties shared custody equally was in force at the time of the June hearing.

At the June 2008 hearing the court noted the DNA tests had shown plaintiff was not the biological father and thus had no rights to the child unless he proved he was the presumed father. It set a trial on that issue and ordered that a custody investigation, which had been put on hold, be completed before the trial. It also reinstated the orders giving defendant sole legal and physical custody pending trial, but granted some visitation to plaintiff. This ruling was partly based on defendant's declaration that on the day of the hearing on the restraining order she sought against plaintiff, a bailiff told her she had to mediate the matter. Because she wanted the restraining order and did not want to mediate, she left and the order was denied.

The court noted that during that time plaintiff, apparently only 16 years old when the child was born, lived with his parents and did not provide any financial support. Defendant lived with plaintiff's parents as well for a time, paying rent and room and board for herself and the child. The court was concerned with defendant's allegations of domestic violence in the home of plaintiff and his parents.

Plaintiff's counsel continued to emphasize that custody and visitation had been equally shared for two to three years and asked that those orders remain in effect pending the trial. The court responded that the original order had been made without sufficient information, noting that, in addition to him not being the biological father, plaintiff never signed a declaration stating the child was his nor was his name on the child's birth certificate. The court denied plaintiff's request for a hearing that day as to why a child custody investigation was unnecessary and stated it would not decide the case "piecemeal."

Both parties were in pro. per. on the day of trial. Plaintiff sought to continue the hearing because he had no lawyer. The court denied the request, in part, because plaintiff's counsel had withdrawn a month earlier, even though plaintiff claimed

he had just received notice a few days ago; in addition, the trial had been continued several times. It did trail the matter to the afternoon. Plaintiff did not appear. The court found that, based on two DNA tests, plaintiff was not the biological father of the child. In issuing a judgment of nonpaternity, the court awarded sole physical and legal custody of the child to defendant, ordering no visitation or contact by plaintiff. It dismissed plaintiff's paternity petition with prejudice.

Two months later plaintiff filed a motion for reconsideration, to change venue, and to "disqualify," although he failed to state whom he was seeking to disqualify. When the case was called no one appeared. After a recess, when again no one was present, the court denied the motion, finding plaintiff had failed to state any new or different circumstances or changes in the law that would support it and thus there was no basis to vacate the judgment dismissing the petition. It also found there was "no standing to bring the motion . . . to disqualify the court or to change venue." After another recess, apparently defendant and plaintiff's father, although not plaintiff, were present. The court stated it had already denied the motion. Plaintiff's father mentioned a long line to get into the courthouse and "absolutely" did not object to the order because it would speed an appeal.

DISCUSSION

1. Alleged Judicial Bias

Plaintiff claims Judge Pollard was biased and "predisposed," relying on several grounds, some of which make no sense or are difficult to understand.

One ground is because at the June 2008 hearing, she stated she would not "have a 50/50 arrangement [for custody] when [plaintiff was] not the father of the child." But plaintiff does not explain why this shows bias. Merely making a ruling, even if incorrect, which we are not determining here, is not evidence of bias. A "judge

necessarily makes and expresses determinations in favor of and against parties. . . . We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." *(Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.) Moreover, this statement was not made at the hearing that ultimately determined paternity and custody.

Plaintiff points to statements Judge Pollard made during that hearing directing the parties to determine how long it would take to complete the child custody investigation and a statement his lawyer made in argument at that hearing. He maintains the judge was trying to obtain a finding in the custody investigation that awarding custody to him would be detrimental to the child and thus be able to avoid applying Family Code section 3020.

But these statements show nothing of the sort. Seeking to have the custody evaluation completed was reasonable. There is no evidence this shows gender bias or that this ruling favored a woman. None of the other comments by Judge Pollard on which plaintiff relies even remotely deal with gender. Further, Family Code section 3020, subdivision (b) has no application because it deals with a public policy applying to the contact between children and their *parents*.

Plaintiff also alleges Judge Pollard tried to avoid a guardianship hearing for fear "it would have exposed the on-going misbehavior and detriment by the mother," "undermin[ing]" the judge's attempts to influence the custody investigation "so she could deny this non-biological 'teeny bopper' any custody or visitation." He claims the "teeny bopper" comment, which was "harsh" and made "in a reprimanding tone," showed "age bias." First, there is no way of telling from the record the tone of the judge's voice. Second, while not every judge would have used the phrase, there is no denying plaintiff was a teenager at the time the child was born and at the time of the hearing. Mere use of those words does not support a claim of age bias.

Plaintiff attributes statements to Judge Pollard that she did "not care about any other orders or law[s]" and that "[n]o one [was] going to tell her what the law stated." But he fails to cite any record references where these statements were allegedly made. Likewise, his generalized claim the judge "tried to protect" defendant by failing to allow evidence on defendant's alleged criminal conduct is unsupported by a record reference.

Plaintiff cites seven cases in which Judge Pollard purportedly was reversed, pointing to one in particular where she ruled in favor of a woman and the man prevailed on appeal. (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238.) That has no relevance to a determination of bias here. Further, a legislative audit of family courts in Marin and Sacramento Counties is completely off the point.

Plaintiff makes a series of charges against Judge Pollard, including that she instructs court reporters not to report everything and has meetings in chambers without reporters. We will not consider these unsubstantiated, irrelevant claims. Additionally, there is nothing to show a letter to plaintiff from his lawyer is in the superior court record; thus it is not properly before us. Likewise, claims about an "ex parte meeting" between Judge Pollard, plaintiff's lawyer, and a third party are not supported by the record. Further, the reporter's transcript does not bear out plaintiff's allegations Judge Pollard "coached" defendant.

We also reject plaintiff's claims Judge Pollard "engages in off bench conspirac[ies]." The arguments are based on an Internet article not properly before us and an anecdotal story without any foundation. Likewise, we will not consider his arguments about the custody investigation report. There is no copy of that report in the record nor is there any record of purported statements made by the investigator or the child.

Judge Pollard's decision not to take testimony at the June 2008 hearing and setting the case for trial does not show bias. A judge has the authority to "provide for the orderly conduct of proceedings before it" (Code Civ. Proc., § 128, subd. (a)(3)) and

"controls the flow of evidence in the courtroom" (*People v. Garcia* (1986) 183 Cal.App.3d 335, 344). Plaintiff also argues Judge Pollard erred in changing custody at an ex parte hearing. But there is no evidence the hearing was ex parte. The only evidence we have is plaintiff's counsel's statement at the beginning of the hearing that the parties had last been before the court a month earlier.

Plaintiff takes exception to the assignment of Judge Pollard to the case once Judge Silbar was transferred to another department. He claims he had a right to challenge her. We agree he could have challenged her under Code of Civil Procedure section 170.6, not section 170.3 on which he relies, but he did not do so. *Oksner v. Superior Court* (1964) 229 Cal.App.2d 672, 690 is inapt because it deals with the lack of authority of a judge who actually has been disqualified. There was also no error in assigning another judge to hear the motion for reconsideration due to Judge Pollard's illness, and in any event plaintiff did not object to it at the time.

Plaintiff complains he has been unable to obtain records from the trial court or this court as to Judge Pollard's decisions that have been appealed, depriving him of records needed in this appeal to show her bias. This claim is not supported by the record, and additionally, without commenting on any other aspect of this argument, those records, if any, are not relevant to our decision in this case and plaintiff has not shown he suffered any prejudice.

2. Evidentiary Issues

Plaintiff claims the court "assumed facts not in evidence" and refused to consider certain evidence and his arguments. But plaintiff did not appear for trial of this matter. That is when he had the right to testify, present evidence, and make his arguments. He apparently is challenging the conduct of the June 2008 hearing. But no final orders were made at that hearing. So if there were any evidentiary errors at that hearing by the court's failure to take testimony, which we do not decide, they were not

prejudicial because plaintiff had the opportunity for testimony at trial, of which he did not avail himself. (Code Civ. Proc., § 475, [even if error shown, no presumption of prejudice or injury].)

At oral argument plaintiff's counsel argued the court's ruling on the paternity action lacked substantial evidence. This was not included in appellant's briefs. But on the merits, it fails. There was evidence plaintiff was not the biological father. In addition, plaintiff did not appear and thus did not put on any evidence as to presumptive parenthood.

Plaintiff also challenges alleged misrepresentations by defendant at the June 2008 hearing. The trial court rules on the credibility of witnesses and evaluates the evidence. It is not our function to reweigh these decisions. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) Plaintiff appears to allege fraud against defendant in connection with our granting her an extension to file her brief. These are unsubstantiated and based on claims outside the record, which we may not consider.

At oral argument plaintiff's counsel argued the court erred in not continuing the trial of the paternity action. This, too, was not raised in appellant's briefs. Even on the merits, however, the claim is not well-founded. The grant or denial of a motion to continue a trial is within the discretion of the trial court. (*Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (2007) 153 Cal.App.4th 621, 630.) The decision denying the continuance was a proper exercise of discretion, based on the fact plaintiff's lawyer had withdrawn from representation a month earlier plus the case already had been continued several times. As it was, the court did continue the hearing until the afternoon calendar and plaintiff failed to appear.

3. Law of the Case and DeFacto Parenthood

Relying on the law of the case doctrine, plaintiff claims the ruling is erroneous as a matter of law because a change in custody and visitation was made at an ex parte hearing. This argument has several flaws.

First, the hearing to which plaintiff refers here was not the trial, which is the subject of the appeal; it is the June 2008 hearing. All parties were present and there is no evidence it was an ex parte hearing. Second, although the court reinstated a prior order giving defendant custody, it was a temporary order. The final orders were made at the trial in November 2008, which plaintiff did not attend. The orders in the judgment resulting from the hearing that day are the ones at issue here.

Third, until the final judgment, the custody and visitation orders were temporary and could be changed without involving the law of the case doctrine. Fourth, the law of the case doctrine does not apply to differing superior court rulings. (*People v. Sons* (2008) 164 Cal.App.4th 90, 100.) It requires courts to adhere to a ruling made by an appellate court in the same case. (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) That is not the situation here.

Plaintiff points to the stipulation for joint custody and visitation, which was the basis for an order entered by Judge Silbar, claiming again this establishes his fatherhood. He also argues defendant stipulated to "de facto" parenthood when she signed the stipulation originally setting out the original custody and visitation orders. But the mere fact of signing the stipulation setting out temporary custody and visitation, during which time plaintiff was to undergo a paternity test, does not mean the court found or defendant agreed he was a de facto parent. In addition, de facto parenthood can be terminated. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1513.) We will not consider the letter from his attorney on which he relies since it was not a part of the superior court file. Moreover, it does not show Judge Pollard's "acknowledgement" of de facto parent status.

Plaintiff also directs us to notices from the Orange County Department of Social Services, apparently referring to mother's request for assistance, which state he had been named as a father. There is no evidence these documents are in the superior court file. In any event, contrary to plaintiff's claim, that department is not an agent of the federal government, the document is not proof plaintiff is the father, and the United States Constitution's supremacy clause is not implicated in this.

Plaintiff cites Family Code section 3105, subdivision (a), which states: "The Legislature finds and declares that a parent's fundamental right to provide for the care, custody, companionship, and management of his or her children, while compelling, is not absolute. Children have a fundamental right to maintain healthy, stable relationships with a person who has served in a significant, judicially approved parental role." This section deals with visitation rights of former legal guardians; plaintiff has never been designated a legal guardian.

DISPOSITION

The judgment is affirmed. The motion to augment the record is granted; the motion to strike respondent's brief is denied. Respondent is entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.